

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: COX IOWA TELCOM, LLC, Complainant, vs. QWEST CORPORATION, Respondent.	DOCKET NO. FCU-02-1
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FINAL DECISION AND ORDER

(Issued April 3, 2002)

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PROCEDURAL HISTORY

On January 3, 2002, Cox Iowa Telcom, LLC (Cox Iowa), filed a formal complaint against Qwest Corporation (Qwest) with the Utilities Board (Board) alleging that Qwest's decision to offer local service freezes (LSFs) to Iowa customers is an anti-competitive measure. On January 22, 2002, Cox Iowa filed an application and motion to stay Qwest's implementation of LSFs in Iowa, which became available to Iowa customers on January 17, 2002.

On January 23, 2002, Qwest filed a response to Cox Iowa's complaint and made a motion to dismiss the complaint, asserting that the Board rules allow for LSFs and that Cox Iowa's complaint, therefore, had no merit.

On February 6, 2002, the Board issued an order docketing the complaint, establishing a procedural schedule, and granting Cox Iowa's motion to stay the imposition of Qwest's LSF. In that order, the Board requested that Qwest file a proposed tariff provision outlining the details of the local service freeze option.

On February 11, 2002, MCI Metro Access Transmission Services, Inc. (MCImetro), filed with the Board a petition to intervene as a local exchange competitor of Qwest. The Board issued an order granting MCImetro's petition on February 25, 2002.

Also on February 11, 2002, Qwest filed a proposed tariff provision regarding the local service freeze in response to the Board's February 6, 2002, order.

A hearing was held in this docket on March 4, 2002. Cox Iowa, Qwest, and the Consumer Advocate Division of the Department of Justice (Consumer Advocate)

entered appearances through their counsel. Also on March 4, 2002, MCImetro filed with the Board a withdrawal of its intervention in this docket.

At the hearing, the Board noted that the number of confirmed slamming complaints received by the Board was relevant to the inquiry and that Board staff was preparing an exhibit outlining that information. On March 7, 2002, the Board issued an order proposing to take official notice of the number of local service slamming complaints received by the Board since January 1, 2001, and revising the procedural schedule so as to allow the parties adequate time to respond to the information. No objections were filed by the parties in response to the slamming information compiled by the Board. Therefore, effective March 13, 2002, all local slamming information compiled by the Board for the purpose of this docket and illustrated in Board's Exhibit "A," became part of the evidentiary record in this matter.

ISSUES

A. Whether the Board has the authority to prohibit the imposition of a local service freeze.

In support of its decision to implement a local service freeze option in Iowa, Qwest cites to Iowa Code § 476.103(8), which states that the Board "shall adopt competitively neutral rules establishing procedures for the solicitation, imposition, and lifting of preferred carrier freezes." Qwest asserts that through this Code section, the Iowa legislature mandated the Board allow for the implementation of a local service freeze and, therefore, the Board cannot prohibit Qwest from implementing its LSF.

Cox Iowa contends that despite the language of Iowa Code § 476.103(8), the Board was given the authority to prohibit the imposition of a local service freeze under the language of Iowa Code § 476.103(1), which provides, "[s]uch rules shall not impose undue restrictions upon competition in telecommunications markets." Cox Iowa contends that Qwest's proposed LSF imposes undue restrictions on Iowa telecommunication competition, and therefore, the Board has the authority to prohibit such a practice.

Consumer Advocate did not address this issue.

The Board finds that Iowa Code § 476.103 grants it the authority to prohibit Qwest from implementing its proposed local service freeze. In Chapter 476.103, the legislature specifically mandated the Board adopt competitively neutral rules regarding the solicitation, imposition, and lifting of preferred carrier freezes, but this section does not specifically mandate the imposition of local service freezes.

In accordance with that Code section, 199 IAC 22.23(2)"d" encompasses the Board's rules regarding preferred carrier freezes. While these rules discuss preferred carrier freezes for local exchange services, 199 IAC 22.23(2)"d"(4)"3" provides:

To the extent a jurisdiction allows for the imposition of preferred service provider freezes on additional preferred service provider selections (e.g., for local exchange, intraLATA/intrastate toll, interLATA/interstate toll service, and international toll.), . . .

This language indicates the Board reserved the right to make the determination at issue in this case.

In addition, the FCC has recognized that "preferred carrier freezes can have a particularly adverse impact on the development of competition in markets soon to be or newly opened to competition." See FCC 98-334, CC Docket No.94-129, ¶ 135. Therefore, the FCC has explicitly authorized individual states to adopt a moratorium on intrastate preferred carrier freezes. Id. at 137. Specifically, the FCC has provided that individual states, based on their observations of slamming incidents in their jurisdictions and the development of competition in relevant markets, "may adopt moratoria on the imposition or solicitation of intrastate preferred carrier freezes if they deem such action appropriate to prevent incumbent LECs from engaging in anti-competitive conduct." Id.

As stated above, the Board's rules in 199 IAC 22.23(2)"d"(4)"3" conform to the FCC's order that allows for jurisdictions to adopt a moratorium on the imposition of a local service freeze if such action is appropriate to maintain healthy competition. Therefore, the Board finds it has the authority to determine whether to allow Qwest to implement a local service freeze option in Iowa.

B. Whether the issue of local exchange carrier slamming is prevalent, or is expected to become prevalent, in Iowa so as to necessitate the implementation of a local service freeze option for the protection of Iowa customers.

Cox Iowa cites to Board's Exhibit "A," which provides that since January 1, 2001, a total of 14 slamming complaints involving local dial tone were confirmed by Board staff as being local slams. (See Exhibit A). Cox Iowa asserts that the information provided in Board Exhibit "A" shows that Iowa consumers are not at risk

for local slams. Cox Iowa also suggests that the Board has sufficient tools to deal with and discipline rogue carriers who commit local slams.

Qwest states that its LSF protection satisfies a legitimate need by thwarting unauthorized slamming. (Tr. at 76-77). Qwest asserts that the 42 local service slamming complaints received by the Board since January 1, 2001, are significant enough to merit the necessity of an LSF. (See Exhibit A). Qwest states that even one local slamming complaint is too many, and the 14 Board-confirmed cases could have been avoided had the LSF option been in effect. (See Exhibit A).

Consumer Advocate asserts that the evidence officially noticed by the Board in Exhibit "A" shows that the occurrence of local service slamming in Iowa is not *de minimis*. (See Exhibit A). Consumer Advocate posits that this information fails to support a prohibition of local service freezes. In addition, Consumer Advocate contends it would be unwise to prohibit the practice of local service freezes in Iowa based on a generalized allegation that the practice creates a potential for abuse.

The record indicates that as of June 30, 2001, Iowa had 1,544,509 end-user switched access lines. (See Exhibit 102). The evidence officially noticed by the Board in Exhibit "A" shows that Board staff has received 42 local service slamming complaints since January 1, 2001, and that four telecommunications carriers have been implicated. (See Exhibit A). Of those complaints, 14 have been determined to be instances of local slamming, 24 have been determined as "no slams," and four remain under investigation. (See Exhibit A).

Despite the assertions by Qwest and Consumer Advocate that the evidence of 14 confirmed local service slams since January 1, 2001, is not *de minimis*, the Board finds that this number is insignificant, especially when placed in proportion with the number of local service lines in Iowa. Therefore, the Board finds that local service slamming is not a problem in Iowa at this time and, as such, does not warrant the imposition of a local service freeze for consumer protection.

C. Whether the implementation of a local service freeze by Qwest Corporation will have an adverse effect on the competitive telecommunications market in Iowa.

Cox Iowa maintains that competition in the telecommunications market is dismal, especially in rural Iowa, and that only a handful of well-positioned competitive local exchange carriers (CLECs) have survived and thrived. Cox Iowa states that the FCC recognized the potential problems with freezes in less competitive markets and, as a result, gave states the ability to adopt moratoria on the imposition or solicitation of intrastate preferred carrier freezes. See FCC 98-334, CC Docket No. 94-129, ¶ 137. Cox Iowa concludes that with only 14 Board-verified local slams by two companies since January 1, 2001 (See Exhibit A), in addition to limited competition in Iowa, especially in the rural areas, the Board has a significant reason to adopt a moratorium on the imposition of local service freezes.

Qwest disagrees with Cox Iowa's position that local competition in Iowa is virtually non-existent. Qwest cites to the FCC Industry Analysis Division of the Common Carrier Bureau report on local telephone competition, which reports that the CLECs in Iowa possess 11 percent of the total market as of June 30, 2001.

(Tr. at 29-30; See also Exhibit 102). Qwest concludes that this figure demonstrates that competition in Iowa is alive and well and could withstand the implementation of a local service freeze.

Consumer Advocate recognizes that local service freezes have the potential to be used in an anti-competitive manner, and if such a use occurs in the local market, it could further slow the development of competition and frustrate the central policy objective of bringing competition to Iowa markets. Consumer Advocate also points out that according to its own evidence, Qwest retains over 85 percent of the local telephone lines in its Iowa territories of incumbency (See Tr. at 152), and according to the FCC, incumbents retain 89 percent of the local telephone lines statewide. (See Exhibit 102).

The fact that Qwest retains a major market share of the local telephone lines in its Iowa territories and that as of June 30, 2001, CLECs possess a small percentage of the total market, demonstrates that local service competition is in its infancy in Iowa. The added step for the customer of contacting both Qwest and the CLEC in order to change the local service provider may be all that is needed to prevent a customer from making that switch.

Given the negligible state of local competition in Iowa and the few instances of local service slamming, the Board finds that a local service freeze implemented by Qwest at this time is unnecessary to protect consumers and will have a detrimental effect on local competition.

FINDINGS OF FACT

1. The number of Board-confirmed local service slams since January 1, 2001, is minimal, especially when placed in proportion with the number of local service lines in Iowa, and demonstrates that local service slamming currently is not a problem in Iowa.

2. CLECs possess a small percentage of the total Iowa telecommunications market; an indicator that local competition is in its infancy in Iowa, and as such, the imposition of a local service freeze will have a detrimental effect on local competition.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and the subject matter of this proceeding pursuant to Iowa Code § 476.103(6).

2. The FCC has given states the authority to adopt a moratorium on the imposition or solicitation of local service freezes, if they deem such action appropriate to prevent incumbent local exchange carriers (LECs) from engaging in anti-competitive conduct. See FCC 98-34, CC Docket No. 94-129, ¶ 137.

3. The Iowa Code and Board rules give the Board the discretion to prohibit Qwest's implementation of a local service freeze in Iowa.

ORDERING CLAUSES

IT IS THEREFORE ORDERED:

1. Pursuant to the findings above, Qwest Corporation is prohibited from implementing a local service freeze in Iowa at this time.
2. Qwest Corporation shall withdraw its proposed tariff provision, filed February 11, 2002, regarding the local service freeze option, within 30 days of the issuance of this order.
3. Any customers enrolled in the local service freeze option prior to the issuance of the Board's February 6, 2002, order granting Cox Iowa Telcom's motion to stay the implementation of the freeze shall be notified of this order and their participation in the local service freeze option shall be terminated within 30 days of the issuance of this order.

UTILITIES BOARD

/s/ Diane Munns

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Elliott Smith

Dated at Des Moines, Iowa, this 3rd day of April, 2002.